97

(1)

Supreme Court, U.S.
FILED

08-34 JUL 01 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No.

IN THE

Supreme Court Of The United States

DOREEN PENBERTHY, RICHARD PENBERTHY
AND COLETTE PENBERTHY,

Petitioners

vs.

AT&T WIRELESS SERVICES , Inc.,
a Delaware Corporation,

Respondent

On Petition For Writ of Certiorari
To The United States Court Of Appeals Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Pro Se Petitioners
Doreen Penberthy, Richard
Penberthy, and Colette
Penberthy
29711 Wells Road
Wesley Chapel, FL 33545
(813) 973-8846

QUESTIONS PRESENTED

The Petitioner plaintiffs-appellants representing themselves pro se in an appeal from the United States District Court, Middle District of Florida, Tampa Division, filed a timely notice of appeal and paid all required fees to present their case to the United States Court of Appeals of the Eleventh Circuit. Petitioners then timely arranged and paid the necessary fees for the Court Reporter in the lower court proceedings to prepare and file the necessary "transcript record excerpts." Petitioners then timely filed their Appellant Brief with the U.S. Court of Appeals for the Eleventh Circuit on Monday, December 17, 2007, two days before its due date.

In a letter dated December 21, 2007 from Mr. Gordon Fields of the Clerk's office of the U.S. Court of Appeals of the Eleventh Circuit, the Petitioners were first noticed that there was a deficiency in the filing because not enough copies of the brief were received, and that the missing copies must be filed within 14 days, or until January 3, 2008.

On December 26, 2007, in a return telephone call with Mr. Joe Caruso of the Clerk's office of the U.S. Court of Appeals of the Eleventh Circuit, the Petitioners were advised of yet another deficiency in their December 17, 2007 filing, that "record excerpts" were missing. Petitioners expressed confusion in that they believed that "record excerpts" had already been filed by the court reporter, and that they were notified that the only missing item were the extra copies of the brief. Mr. Caruso clarified that the court did already receive the "transcript record excerpts" but that the "record excerpts" he was referring to were different from the "transcript record excerpts." Petitioners asked Mr. Caruso for a like extension to January 3, 2008 to file the record excerpts along with the missing copies of the brief. Mr. Caruso denied the extension request and stated that the

case would be dismissed the next day. He further advised that after the dismissal, the only way to get the case reinstated would be if the Court granted a motion that was accompanied by the missing items. On December 27, 2007, the U.S. Court of Appeals of the Eleventh Circuit dismissed the case because of the failure to file record excerpts timely.

Petitioners then worked diligently and within 3 days, on December 29, 2007, filed a timely Motion to Set Aside Dismissal and Remedy Default accompanied by the requisite number of the missing brief copies and the requisite number of the missing record excerpt copies, to perfect the filing in every respect.

On January 25, 2008, the U.S. Court of Appeals of the Eleventh Circuit denied the Petitioners Motion to Set Aside Dismissal and Remedy Default.

On February 14, 2008, Petitioners filed a timely Motion for Reconsideration, and on March 12, 2008 filed a timely Reply to Appellee's Response to that motion.

On March 13, 2008, the U.S. Court of Appeals of the Eleventh Circuit denied the Motion for Reconsideration.

The questions presented are:

1. Whether pro se petitioners may file record excerpts in a civil appeals case within days after the original due date because of "extraordinary circumstances" and where the delay in filing was inadvertent, was not in bad faith, and neither prejudices the respondent nor adversely impacts administration of the case.

2. Whether the U.S. Court of Appeals of the Eleventh Circuit erred in prematurely dismissing the case on

December 27, 2007, prior to an extension previously granted to January 3, 2008.

3. Whether the filing of the record excerpts on December 29, 2007 should be deemed timely since the U.S. Court of Appeals of the Eleventh Circuit provided a deficiency notice on December 21, 2007 that granted petitioners an extension date to January 3, 2008.

4. Whether the U.S. Court of Appeals of the Eleventh Circuit has adopted local rules that are inconsistent with sister courts regarding the treatment of late filings of either an appendix to the brief or record excerpts.

PARTIES TO THE PROCEEDING

Petitioners: Doreen Penberthy, Richard Penberthy, Colette Penberthy Respondent: AT&T Wireless Services, Inc. (subsequent to the commencement of the lawsuit, AT&T Wireless Services, Inc. merged with Cingular Wireless, LLC, then owned by parent corporations BellSouth Corporation and SBC Communications, Inc. BellSouth Corporation is now a wholly owned subsidiary of AT&T Inc. and SBC Communications, Inc. changed its name to AT&T Inc. effective November 18, 2005.)

TABLE OF CONTENTS

Questions Presented.....1

Parties to the Proceeding.....3

Table of Cited Authorities.....6

Opinions and Orders.....8

Statement of Jurisdiction.....8

Statutes and Rules Involved.....9

Statement of the Case.....15

Summary of the Argument.....20

Petitioners Argument I.....22

Petitioners Argument II.....27

Petitioners Argument III.....28

Petitioners Argument IV.....29

U.S. Supreme Court Rule 10 Considerations.....31

Conclusion.....31

Certificate of Service.....36

Appendix- U.S. Supreme Court Extension.....38

Appendix-U.S. Court of Appeals 3-13-08 Order.....40

TABLE OF CONTENTS
(continued)

Appendix-U.S. Court of Appeals 1-25-08 Order.....41

Appendix- U.S. Court of Appeals 12-27-07 Order....42

Appendix- U.S. District Court 8-17-07 Order.....43

TABLE OF CITED AUTHORITIES

Cases

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993).....23

Cheney v. Anchor Glass Container Corp., 71 F.3d 848 (11th Cir. 1996) 23

Advanced Estimating System, Inc. v. Timothy J. Riney, 77 F.3d 1322 (11th Cir. 1996) 24

Rules

FRAP 27.....9, 18

11th Cir. R. 27-1.....9, 19

11th Cir. R. 27-2.....10, 19

11th Cir. R. 27-3.....10

FRAP Rule 30.....10, 29

11th Cir. R. 30-1.....10, 26, 29

FRAP 31.....11

11th Cir. R. 31-1.....11, 18

FRAP Rule 42.....11, 30, 31

11th Cir. R. 42-2.....12, 18, 22, 27, 30

5th Cir. R. 42.2.1.2.....14, 30

TABLE OF CITED AUTHORITIES
(continued)

Rules

10th Cir. R. 42.1.....14, 30

FRAP 45.....14

FRAP 46.....14

11th Cir. R. 46-1.....15, 19

Supreme Court R. 10.....31

OPINIONS AND ORDERS

The opinions and orders referenced below are reprinted in the Appendix. The order of the United States Supreme Court, entered June 9, 2008, granting an extension to file a writ of certiorari. The order of the United States Court of Appeals for the Eleventh Circuit, entered on March 13, 2008, denies the Petitioners' motion for reconsideration. The order of the United States Court of Appeals for the Eleventh Circuit, entered on January 25, 2008, denies the Petitioners' motion to reinstate the appeal. The order of the United States Court of Appeals for the Eleventh Circuit, entered on December 27, 2007, dismisses the Petitioners' appeal for failure to file the record excerpts timely. The order of the United States District Court, Middle District of Florida, Tampa Division, entered on August 17, 2007, dismisses the Petitioners' Motion for Relief.

STATEMENT OF JURISDICTION

The order of the United States District Court, Middle District of Florida, Tampa Division, dismissed the Petitioners' motion for relief. The order of the United States Court of Appeals for the Eleventh Circuit, entered on December 27, 2007, dismissed the Petitioners' appeal for failure to file the record excerpts timely. Petitioners filed a timely motion to set aside dismissal and remedy default with the United States Court of Appeals for the Eleventh Circuit on December 29, 2007. The order of the United States Court of Appeals for the Eleventh Circuit, entered on January 25, 2008, denied the Petitioners' motion to reinstate the appeal. Petitioners filed a timely motion for reconsideration with the United States Court of Appeals for the Eleventh Circuit on February 14, 2008. The order of the United States Court of Appeals for the Eleventh

Circuit, entered on March 13, 2008, denied the Petitioners' motion for reconsideration. Petitioners requested and on June 9, 2008 were granted an extension until July 1, 2008 to file a Petition For a Writ of Certiorari with the Supreme Court of the United States. The jurisdiction of this Court is invoked under *28 U.S.C. § 1254*(1).

STATUTES AND RULES INVOLVED

This case involves Rules 27, 30, 31, 42, 45 and 46 of the Federal Rules of Appellate Procedure and the companion local rules and IOPs , which are italicized.

FRAP 27. Motions, provides, in pertinent part:
(4) Reply to Response. Any reply to a response must be filed within 5 days after service of the response. A reply must not present matters that do not relate to the response.
(b) Disposition of a Motion for a Procedural Order. The court may act on a motion for a procedural order — including a motion under Rule 26(b) — at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.

11th Cir. R. 27-1 Motions, provides, in pertinent part:
(c) Motions for Procedural Orders Acted Upon by the Clerk. The clerk is authorized, subject to review by the court, to act for the court on the following unopposed procedural motions:
(1) to extend the time for filing briefs or other papers in appeals not yet assigned or under submission;

(3) to make corrections at the request of counsel in briefs or pleadings filed in this court;
(7) to supplement or correct records;
(11) to reinstate appeals dismissed by the clerk;

11th Cir. R. 27-2 Motion for Reconsideration.
Except as otherwise provided in 11th Cir. R. 40-4, a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing.

11th Cir. R. 27-3 Successive Motions for Reconsideration Not Permitted.
A party may file only one motion for reconsideration with respect to the same order. Likewise, a party may not request reconsideration of an order disposing of a motion for reconsideration previously filed by that party.

FRAP Rule 30. Appendix to the Briefs , provides, in pertinent part:

(c) Deferred Appendix.
(1) Deferral Until After Briefs Are Filed. The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served.

(f) Appeal on the Original Record Without an Appendix. The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

11th Cir. R. 30-1 Record Excerpts - Appeals from District Court and Tax Court. Appeals from district courts and the

tax court shall be on the original record without requirement of the appendix prescribed by FRAP 30. At the time of filing a brief, appellant shall file five copies of the following portions, and only the following portions of the district court or tax court record, to be bound together but not in the brief:

These copies shall be reproduced on white paper by any duplicating or copying process capable of producing a clear black image, with a cover containing the information specified in 11th Cir. R.28-1(a) and captioned "Record Excerpts."

FRAP 31. Serving and Filing Briefs, provides, in pertinent part:
(a) Time to Serve and File a Brief.
(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served.
(c) Consequence of Failure to File. If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal.

11th Cir. R. 31-1 Briefs - Time for Serving and Filing, provides, in pertinent part:
(a) Briefing Schedule. Except as otherwise provided herein, the appellant shall serve and file a brief within 40 days after the date on which the record is deemed filed as provided by 11th Cir. R.12-1.

FRAP Rule 42. Voluntary Dismissal
(a) Dismissal in the District Court. Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

11th Cir. R. 42-2 Dismissal in a Civil Appeal for Appellant's Failure to File Brief or Record Excerpts by Due Date.
(a) Applicability of Rule. The provisions of this rule apply to all civil appeals, including Tax Court appeals, bankruptcy appeals, appeals in cases brought pursuant to 28 U.S.C. §§ 2254 and 2255, review of agency orders, and petitions for extraordinary writs when briefing has been ordered, but not including appeals of orders revoking supervised release or of orders entered pursuant to Rule 35 of the Federal Rules of Criminal Procedure or 18 U.S.C. § 3582.

(b) Notice of Due Date for Filing Brief and Record Excerpts. Eleventh Circuit Rule 31-1 establishes the due date for filing a brief and record excerpts. To facilitate compliance, the clerk will send counsel and pro se parties a notice confirming the due date for filing appellant's brief and record excerpts consistent with 11th Cir. R. 31-1, including therein a reminder of the consequences of default. However, delay in or failure to receive such notice does not affect the obligation of counsel and pro se parties to file a brief within the time permitted by the rules.

(c) Dismissal Without Further Notice. When an appellant has failed to file the brief or record excerpts by the due date as established by 11th Cir. R. 31-1 and set forth in the clerk's notice, or, if the due date has been extended by the court, within the time so extended, an appeal shall be treated as dismissed for failure to prosecute on the first business day following the due date. The clerk thereafter will enter an order dismissing the appeal and mail a copy of

that order to counsel and pro se parties. If an appellant is represented by appointed counsel, the clerk may refer the matter to the Chief Judge for consideration of possible disciplinary action against counsel in lieu of dismissal.

(d) Effect of Pending Motion to Extend Time. The clerk shall not dismiss an appeal during the pendency of a timely filed motion for an extension of time to file appellant's brief or record excerpts, but if the court denies such leave after the expiration of the due date for filing the brief or record excerpts, the clerk shall dismiss the appeal.

(e) Motion to Set Aside Dismissal and Remedy Default. An appeal dismissed pursuant to this rule may be reinstated only upon the timely filing of a motion to set aside the dismissal and remedy the default showing extraordinary circumstances, accompanied by the required brief and record excerpts. Such a motion showing extraordinary circumstances, accompanied by the required brief and record excerpts, must be filed within 14 days of the date the clerk enters the order dismissing the appeal.
The timely filing of such a motion, accompanied by the required brief and record excerpts, and a showing of extraordinary circumstances, is the exclusive method of seeking to set aside a dismissal entered pursuant to this rule. An untimely filed motion to set aside dismissal and remedy default must be denied unless the motion demonstrates extraordinary circumstances justifying the delay in filing the motion, and no further filings shall be accepted by the clerk in that dismissed appeal.

(f) Failure of Appellee to File Brief by Due Date. When an appellee fails to file a brief by the due date as established by 11th Cir. R. 31-1, or, if the due date has been extended by the court, within the time so extended, the appeal will be submitted to the court for decision without further delay, and the appellee will not be heard at oral argument (if oral

argument is scheduled to be heard) unless otherwise ordered by the court.

FIFTH CIRCUIT RULE 42.3.1.2 provides "Appeals without Counsel. The clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution, unless the default is remedied before that date. If the default is remedied within that time, the clerk must not dismiss the appeal."

TENTH CIRCUIT RULE 42.1 provides "Dismissal for failure to prosecute. When an appellant fails to comply with the Federal Rules of Appellate Procedure or these rules, the clerk will notify the appellant that the appeal may be dismissed for failure to prosecute unless the failure to comply is remedied within a designated time."

FRAP 45. Clerk's Duties

11th Cir. I.O.P. -
1. Telephone Inquiries. The clerk's office welcomes telephone inquiries from counsel concerning rules and procedures. Counsel may contact the appropriate deputy clerk by calling the clerk's office. The clerk is also available to confer with counsel on special problems.

FRAP 46. Attorneys, provides, in pertinent part:
(a) Admission to the Bar.
(2) Application. An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:
"I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of theUnited States."

(3) Admission Procedures. On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

11th Cir. R. 46-1 Bar Admission and Fees, provides, in pertinent part:

Only attorneys admitted to the bar of this court may practice before the court, except as otherwise provided in these rules. Admission is governed by FRAP 46 and this Eleventh Circuit Rule. To request admission to the bar, an attorney must complete an application form, available on the Internet at www.ca11.uscourts.gov, and submit the form to the clerk's principal office in Atlanta. The application form must be accompanied by:

- *a certificate of good standing issued within the previous six months from a court described in FRAP 46(a)(1); and*
- *a non-refundable admission fee of $170.00 payable to Clerk, U.S. Court of Appeals, Eleventh Circuit.*

STATEMENT OF THE CASE

This is a case arising from the subsequent discovery that an arbitrator was bias and had a duty to but failed to disclose his significant financial interest in the Defendant. Upon discovery, the Plaintiffs representing themselves pro se, filed a timely motion for relief with the United States District Court, Middle District of Florida, Tampa Division, to vacate the judgment and order confirming the arbitration award, but was denied that motion.

A notice of appeal was timely filed and the case was advanced to the United States Court of Appeals of the Eleventh Circuit. The appellate court has not heard the case on its merits since the appellate court dismissed the

case because of missing record excerpts. The purpose of this Writ of Certiorari is to petition the appellate court's dismissal of the case.

As previously stated, Petitioners filed a timely notice of appeal and paid all required fees to present their case to the United States Court of Appeals of the Eleventh Circuit on September 17, 2007.

On September 26, 2007 Petitioners timely arranged and paid the necessary fees for the Court Reporter to prepare and file official "transcript record excerpts" that would supplement the record for the unofficial rough draft transcripts that were provided as exhibits to the motions filed with the district court.

The United States Court of Appeals of the Eleventh Circuit mailed a letter to Petitioners dated November 6, 2007. It stated in part "... The above date is the date the record was deemed completed and filed, on the date the court reporter filed the transcript with the district court, as provided by 11th Cir. R. 12-1. THIS IS THE ONLY NOTICE YOU WILL RECEIVE CONCERNING THE DUE DATE FOR FILING BRIEFS....."

Having received this letter indicating that the transcript record excerpts were acknowledged by the court as already filed, the Petitioners believed the only remaining filing due for the U.S. Court of Appeals for the Eleventh Circuit was the Appellant Brief.

The Petitioners' Appellant Brief was timely filed on Monday, December 17, 2007, two days before its due date.

On Friday, December 17, 2007, Petitioners left for a holiday vacation. Retrieving telephone messages remotely, on Saturday, December 22, 2007, petitioners noted that a phone call message was received from the U.S. Court of

Appeals requested a return call. Over the next several days, there were several messages left by the Petitioners with the U.S. Court of Appeals, but no return calls back from the U.S. Court of Appeals.

The Petitioners returned from their vacation on December 26, 2007 and received the following letter. In this notice letter dated Friday December 21, 2007 from Mr. Gordon Fields of the Clerk's office of the U.S. Court of Appeals of the Eleventh Circuit, the Petitioners were advised that there was a deficiency in the filing because not enough copies of the brief were received, and that the missing copies must be filed within 14 days, or until January 4, 2008. On December 26, 2007, Petitioners telephoned Mr. Gordon Fields and received confirmation from him that the extended due date was in place.

On December 26, 2007, in a telephone call from Mr. Joe Caruso of the Clerk's office of the U.S. Court of Appeals of the Eleventh Circuit, he stated that it was his first day back from a 2-week vacation, and besides the missing brief copies that Mr. Gordon Fields was working on, he must inform us there is yet another deficiency in that "record excerpts" were missing. Petitioners expressed confusion in that they believed that "record excerpts" had already been filed by the court reporter, and that they were previously notified that one deficiency existed, that being missing extra copies of the brief. Mr. Caruso clarified that the court did already receive the "transcript record excerpts" but that the "record excerpts" he was referring to were different from the "transcript record excerpts." Petitioners expressed a willingness to remedy this newly known matter as soon as possible asked Mr. Caruso if we could file the record excerpts with the missing copies of the briefs, by the extension date granted to January 3, 2008. Mr. Caruso replied with a no answer and stated the case would be dismissed the next day. He further stated that after the dismissal, the only way to get the case reinstated would be

if the Court granted a motion that was accompanied by the missing items.

On December 27, 2007, the U.S. Court of Appeals of the Eleventh Circuit dismissed the case pursuant to local rule 11th Cir. R. 42-2 (c) which provides, in pertinent part: "When an appellant has failed to file the brief or record excerpts by the due date as established by 11th Cir. R. 31-1 and set forth in the clerk's notice, or, if the due date has been extended by the court, within the time so extended, an appeal shall be treated as dismissed for failure to prosecute on the first business day following the due date."

Petitioners then worked diligently and within 3 days, on December 29, 2007, filed a timely Motion to Set Aside Dismissal and Remedy Default accompanied by the requisite number of the missing brief copies and the requisite number of the missing record excerpt copies, to perfect the filing in every respect.

On January 25, 2008, the U.S. Court of Appeals of the Eleventh Circuit denied the Petitioners Motion to Set Aside Dismissal and Remedy Default.

On February 13, 2008, in a telephone call to Mr. Joe Caruso of the Clerk's office of the U.S. Court of Appeals of the Eleventh Circuit, the Petitioners first learned that Appellee had filed, on January 3, 2008, an Appellee's Response In Opposition To Appellants' Motion To Set Aside Dismissal And Remedy Default. Petitioners advised Mr. Caruso of the Clerk's office that they had never received a copy of this filing. Petitioners then telephoned counsel for the Appellee and he acknowledged their error. Since the Petitioners were not aware and not serviced a copy of this filing after more than 5 days passed, they were prevented and not afforded an opportunity to file a Reply to the Appellee's Response, in accordance with Federal Rule of Appellate Procedure Rule 27(4).

Also on February 13, 2008, upon Petitioners' request, Mr. Caruso of the Clerk's office, faxed the Petitioners a copy of the Appellee's Response In Opposition To Appellants' Motion To Set Aside Dismissal And Remedy Default, which was stamped as accepted as filed with the Court on January 3, 2008. Upon receipt of the faxed copy and inspection of the document, the Petitioners noted that the Court should not have accepted the filing since it was signed and filed by M. Derek Harris, counsel, that was not qualified to participate in the appeal, because he had not complied with the Eleventh Circuit's local Rule 46-1. Petitioners then telephoned back Mr. Caruso to explain their inspection findings and Mr. Caruso agreed that (a) M. Derek Harris was not an attorney qualified to participate in the appeal, and (b) that the accepting of the filing signed by M. Derek Harris, was a mistake and that the Court should not have accepted the filing after all, of the Appellee's Response In Opposition To Appellants' Motion To Set Aside Dismissal And Remedy Default. Mr. Caruso advised that the only opportunity remaining to bring the February 13, 2008 events to the Court's attention, is to file a Motion for Reconsideration, under local rule 27-2.

The next day, on February 14, 2008, Petitioners did file a timely motion pursuant to the Court's local rule 11th Cir. R 27-2, entitled "Motion for Rehearing/Reconsideration of Decision To Dismiss For Failure To File Record Excerpts Timely." The Motion included a description of the February 13, 2008 events coupled with the consequences and harm caused to Plaintiffs by both the Appellee and Eleventh Circuit Court's non-compliance with the rules. The Petitioners also suggested that the Court strike the improperly filed January 3, 2008 Appellee Response. The striking of this filing would have resulted in the Petitioners' Motion to Set Aside Dismissal as unopposed, and therefore local rule 11th Cir. R. 27-1(c) (11) would have allowed the

Clerk to reinstate the appeal previously dismissed by the clerk.

Due to the immediate deadline to file the "Motion for Rehearing/Reconsideration of Decision To Dismiss For Failure To File Record Excerpts Timely", it should also be noted that Plaintiffs had to incur travel expenses to fly round trip between Tampa and Atlanta, in order to ensure timeliness of the filing by hand-delivering the Motion to the Court.

In response to the Appellee errors and events of February 13, 2008 previously described, the Appellee took untimely but corrective action by filing two documents with the Court, an "Appearance of Counsel Form" for attorney M. Derek Harris, and "Notice of Filing Amended Certificate of Service and Consent to Rehearing."

On March 12, 2008, consistent with the deadline advised by Mr. Caruso of the Clerk's office and his directive to fax the filing, the Petitioners filed a "Reply to Appellee's Response" and mailed a hard copy.

On March 13, 2008, the U.S. Court of Appeals of the Eleventh Circuit denied the Motion for Reconsideration.

SUMMARY OF THE ARGUMENT

The pro se petitioners have shown sufficient extraordinary circumstances to allow record excerpts to be filed after the original due date because the delay in filing was inadvertent, was not in bad faith, and neither prejudices the respondent nor adversely impacts administration of the case. The petitioners, in advance of their due dates, timely complied with their obligations in this case to file the notice of appeal, provide payment of the docket or filing fees, arranged and provided payment to the court reporter to file

transcript record excerpts, filed copies of a correctly formed Appellant Brief, and furnished copies to all attorneys representing the Appellee. The pro se petitioners did not act in bad faith but genuinely believed that the execution of these steps completed their procedural obligations in this matter. The petitioners later learned, however, that they inadvertently were short with the number of copies of the Appellant Brief supplied to the appellate court, and largely because of confusion with the like terms "transcript record excerpts" and "record excerpts", inadvertently did not supply the requisite record excerpts. Upon learning of the deficiencies, the petitioners immediately remedied the deficiencies within days, demonstrating good faith and diligence. The appellate court's actions in this case also contributed to the extraordinary circumstances in this case. The Clerk of the appellate court prepared a written notice to petitioners advising them of only one defect, that additional copies of the brief were necessary and granted a 14-day extension for the petitioners to perfect the deficiency. Within 5 days, , the Clerk of the appellate court then notified the petitioners again, this time by telephone, of another defect, that record excerpts should have also been filed. Despite the petitioners request to remedy both defects at the same time, the Clerk denied the request and then the appellate court swiftly proceeded to dismiss the case, before the original 14-day extension period expired.

It is argued that the record excerpts should be deemed to be timely filed since the record excerpts deficiency along with the deficiency of missing copies of the brief, were both remedied before the 14-day extension period tolled and that it should be broadly interpreted to allow the extended due date to apply to both defects. Otherwise, the petitioners are harmed by an incomplete notice of deficiency on the part of the appellate court in the first place.

Additionally, it is argued that the appellate court erred in dismissing the case before an extension period to remedy

noticed defects had expired, and that is cause to strike the dismissal.

Finally, it is argued that inconsistencies with local rules at sister courts *are discriminatory in that unlike* the 11th Circuit rules that permits a dismissal without notice, the sister courts impose a burden on the court to prepare a notice of the deficiency, followed by an extension to cure the deficiency.

TITLE: BRIEF FOR PETITIONER

ARGUMENT

I.

LOCAL RULE 42-2 OF THE U.S. COURT OF APPEALS OF THE ELEVENTH CIRCUIT PROVIDES THAT A DISMISSAL IN A CIVIL APPEAL FOR APPELLANT'S FAILURE TO FILE RECORD EXCERPTS BY THE DUE DATE MAY BE REINSTATED UPON THE TIMELY FILING OF A MOTION TO SET ASIDE DISMISSAL AND REMEDY THE DEFAULT SHOWING EXTRAORDINARY CIRCUMSTANCES, ACCOMPANIED BY THE REQUIRED BRIEF AND RECORD EXCERPTS.

"Extraordinary Circumstances", as used in 11th Cir. R. 42-2, is not defined in the rules.

Based on petitioners case law research, it appears that while "extraordinary circumstances" could not be found in 11th Circuit court cases, "excusable neglect" , a similar standard, has been found in both a leading U.S. Supreme court case which is also referenced in two found 11th Circuit court cases.

The Supreme Court has established a flexible analysis of "excusable neglect" in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)*, where the Court held that an attorney's inadvertent failure to file a proof of claim can constitute excusable neglect under *Bankruptcy Rule 9006(b)(1).*

In the *Pioneer* case, the Supreme Court held that:
(a) Congress plainly contemplated that the courts would be permitted to accept late filings caused by inadvertence, mistake, or carelessness, not just those caused by intervening circumstances beyond the party's control, and that "excusable neglect," as used in several of the Federal Rules of Civil Procedure, is understood to be a somewhat "elastic concept, and

(b) The determination of what sorts of neglect will be considered "excusable" is an equitable one, taking account of all relevant circumstances.

It was held in *Pioneer*, first the delay in filing must be due to "neglect," which the Court defines to include "inadvertence, mistake, or carelessness", and second, the neglect must be "excusable." The excusability determination "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." These circumstances include:

> [1] the danger of prejudice to the debtor[or non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.

The 11th Circuit Court of Appeals also has applied the "excusable neglect" factors in *Pioneer* to other cases. See *Cheney v. Anchor Glass Container Corp., 71 F.3d 848 (11th*

Cir. 1996) and *Advanced Estimating System, Inc. v. Timothy J. Riney, 77 F.3d 1322 (11th Cir. 1996).*

Applying the *Pioneer* factors to the subject case, overwhelmingly favor the Petitioners, as follows.

First, the pro se petitioners' error in not filing the record excerpts timely was clearly an inadvertent mistake. There was obvious confusion which led the petitioners to believe that the terms "record excerpts" and "transcript record excerpts" referred to the same document. On September 26, 2007 Petitioners timely arranged and paid the necessary fees for the Court Reporter to prepare and file official "transcript record excerpts" that would supplement the record for the unofficial rough draft transcripts that were provided as exhibits to the motions filed with the district court. Petitioners then received a letter from the United States Court of Appeals of the 11th Circuit, dated November 6, 2007, acknowledging the filing of the official transcript record excerpts. That letter stated in part "...The above date is the date the record was deemed completed and filed, on the date the court reporter filed the transcripts with the district court, as provided by 11th Cir. R. 12-1. THIS IS THE ONLY NOTICE YOU WILL RECEIVE CONCERNING THE DUE DATE FOR FILING BRIEFS....." The language and presentation style of this letter from the court caused the petitioners to believe that the "record excerpts" filing requirement had now been met and the only thing left to do was to file the copies of the Appellant Brief. Additionally, the Petitioners' belief that the "record excerpts" were already filed was also communicated to the Clerk's office of U.S. Court of Appeals, in a telephone call on December 26, 2007. Upon receiving clarification in that phone call, the pro se petitioners worked diligently and filed the non-transcript "Record Excerpts" on December 29, 2007.

Second, pro se petitioners are not attorneys and must rely on guidance from the Clerk's office and clarity of the written rules. As demonstrated in the previous paragraph, the letter from the Clerk's office dated November 6, 2007, lacked clarity and contributed to the petitioners delay in filing the "Record Excerpts." Also, the Clerk's office December 21, 2007 letter, cited the one deficiency of missing copies of the brief, but was lacking in that it did not mention the deficiency of the "Record Excerpts." Since the "Record Excerpts" had a due date of December 19, 2007, the Clerk's office should have been aware, at the time of drafting the December 21, 2007 letter, of this additional deficiency of "Record Excerpts", but made no mention of it. Had that second deficiency of "Record Excerpts' been mentioned in the December 21, 2007 letter, the embedded extension date to January 4, 2008, would have been extended for the "Record Excerpts" and the "Record Excerpts" would have been considered as timely filed on December 29, 2007. Additionally, the Appellants' Brief was filed with the Clerk's office 2 days early, on December 17, 2007, before the due date of December 19, 2007, in enough time for the petitioners to request an extension to file the "Record Excerpts', had they been aware of the deficiency as the the Clerk's office should have been. But, as previously noted, the staff member at the Clerk's office that raised attention to the "Records Excerpt" deficiency was on a 2-week vacation, and didn't inform the petitioners until it was too late to request an extension of time to file the "Record Excerpts." In summary, the Clerk's office actions and inactions, as well as the lack of clarity in the written local rules are contributory to the petitioners' delay in the filing of the "Record Excerpts." In short, the delay in filing the "Record Excerpts" is mitigated by factors that were not within control of the petitioners. The confusion that the pro se petitioners suffered shows under any "reasonable person" standard that the delay was partly outside of the petitioners' control.

Third, the Appellee, or non-movant, was not prejudiced by the delay. The Appellee had been timely served with copies of the Appellants' Brief, before its December 19, 2007 due date, which properly referenced all pertinent filings contained in the original record at the district court level. For example, in the preliminary statement of the Appellants' Brief, it states in part "... References to the record on appeal will be designated by the United States District Court Docket Number (e.g., "[Dkt. No. ___]". Official Transcript Excerpts have been provided to supplement the record for the unofficial rough draft transcripts that were provided as exhibits to the motions filed in the District Court [Dkt. Nos 39, 41, 42, 44, and 45]. All transcript excerpts were filed with the United States District Court and are part of the record on appeal. (Notice of Filing Transcript Excerpts of Arbitration Hearing filed 11/02/07 [Dkt. No., 51].)" All documents referred to in the Appellants Brief were already in the Appellee's possession, since they were previously supplied as part of the District Court proceeding. In summary, the documents finally contained in the "Record Excerpts" filed late, on December 29, 2007, were simply copies of what was already in Appellee's possession. Therefore, the non-movant party suffered no injury or prejudice over the delay.

Fourth, the length of the delay and its potential impact on judicial proceedings was very minimal. The Record Excerpts had an original due date of December 19, 2007, and were filed only 10 days late, on December 29, 2007. There is no evidence of any adverse impact on the U.S. Court of Appeals of the Eleventh Circuit or its resources by permitting the case to be tried as it would have been had Petitioners complied with Local Rule30-1 and filed the "Record Excerpts" together with their "Appellants' Brief", by the due date of December 19, 2007.

Fifth, it is clear that the pro se petitioners did not act in bad faith, but rather tried their very best, with genuine and

sincere efforts, to comply with all the appeal steps, with both attentiveness and diligence. The subject of this writ petition is that the 11th Circuit court dismissed the case because "Record Excerpts" were not filed. Yet, as soon as they learned of the deficiency on December 26, 2007, they worked diligently and filed the "Record Excerpts" in only 3 days, on December 29, 2007.

In summary, the petitioners filed a timely motion, accompanied by the brief and record excerpts, have clearly demonstrated "extraordinary circumstances" and have therefore met all requirements imposed under the 11th Circuit local rule 42-2 to reinstate the case. Accordingly, the 11th Circuit Court's dismissal of the appeal case and its denial of subsequent motions to reinstate the case is improper.

II.

THE U.S. COURT OF APPEALS OF THE ELEVENTH CIRCUIT ERRED IN PREMATURELY DISMISSING THE CASE ON DECEMBER 27, 2007, PRIOR TO AN EXTENSION PREVIOUSLY GRANTED TO JANUARY 4, 2008.

In a letter dated December 21, 2007 from Mr. Gordon Fields of the Clerk's office of the U.S. Court of Appeals of the Eleventh Circuit, the Petitioners received a deficiency notice and were given 14 days, or until January 4, 2008, to correct the deficiency.

The 11th Circuit erred when it ruled on December 27, 2007 to dismiss the case since this deficiency extension period to January 4, 2008 was still outstanding. Instead the Court should have waited until January 4, 2008, the date the extended period had expired, before making a ruling. Had this extension period been respected by the 11th Circuit

Court, it would have found that on its expiration date of January 4, 2008, the Appellants had completely perfected their obligations under the appeal and therefore a dismissal improper.

III.

THE FILING OF THE RECORD EXCERPTS ON DECEMBER 29, 2007 SHOULD BE DEEMED TIMELY SINCE THE U.S. COURT OF APPEALS OF THE ELEVENTH CIRCUIT PROVIDED A DEFICIENCY NOTICE DATED DECEMBER 21, 2007 THAT GRANTED AN EXTENSION UNTIL JANUARY 3, 2008.

In a letter dated December 21, 2007 from Mr. Gordon Fields of the Clerk's office of the U.S. Court of Appeals of the Eleventh Circuit, the Petitioners were advised that there was a deficiency in the filing because not enough copies of the brief were received, and that the missing copies must be filed within 14 days, or until January 4, 2008.

In this letter, the only deficiency cited was missing copies of the appellant brief. There was no mention whatsoever, that "Record Excerpts" were missing. Even though the "Record Excerpts" hadn't been filed and had a due date of December 19, 2007, the Clerk's office should have been aware, at the time of drafting the December 21, 2007 letter, of this additional deficiency of "Record Excerpts", but failed to make any mention of it.

Instead, the "Record Excerpts" deficiency was not communicated to petitioners by the Clerk's office until a December 26, 2007 telephone call, and even though requested, the petitioners were not afforded any opportunity to remedy the deficiency.

In summary, the Clerk's office failed to provide adequate notice of the "Record Excerpts" deficiency, and their letter dated December 21, 2007 was insufficient, unclear, and lacking. Had that second deficiency of "Record Excerpts' been included in the December 21, 2007 letter, the embedded extension date to January 4, 2008, would have been extended to the "Record Excerpts" and the "Record Excerpts" when filed on December 29, 2007 would have been considered as timely filed.

In summary, the U. S. Court of Appeals for the Eleventh Circuit deficiency notice dated December 21, 2007, should be broadly interpreted to and allow an extension period of January 4, 2008, to cover all deficiencies that the 11th Circuit should have been aware of. Accordingly, the "Record Excerpts" should be deemed timely when filed on December 29, 2007, before the extension due date of January 4, 2008. Accordingly, the 11th Circuit courts dismissal for the failure to timely file "Record Excerpts" was improper.

IV.
THE U.S. COURT OF APPEALS OF THE ELEVENTH CIRCUIT HAS ADOPTED LOCAL RULES THAT ARE INCONSISTENT WITH SISTER COURTS REGARDING THE TREATMENT OF LATE FILINGS OF EITHER AN APPENDIX TO THE BRIEF OR RECORD EXCERPTS.

The U.S. Court of Appeals of the Eleventh Circuit does not require the "Appendix to the Briefs" imposed by the Federal Rule of Appellate Procedure Rule 30. Instead, the Eleventh Circuit court had adopted local rule 11th Cir. R. 30-1, which provides that appeals from its district courts shall be on the original record without requirement of the appendix prescribed by FRAP 30, and imposes that instead of "Appendix to the Briefs", the filing of "Record Excerpts".

Further, as the companion local rule to the Federal Rule of Appellate Procedure Rule 42, Voluntary Dismissal, the U.S. Court of Appeals of the Eleventh Circuit local rule 42-2 provides that in the event of Appellant's failure to file Record Excerpts by the original due date, or extended due date, an appeal shall be treated as dismissed for failure to prosecute on the first business day following the due date.

In sister courts, however, the local companion rules to FRAP 42 regarding Voluntary Dismissals, are much more forgiving in the late filing of either the "Appendix to the Briefs" or "Record Excerpts.
(b) Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

For example, some sister courts, impose a notification burden on the court followed by the granting of a curative period, as follows:

FIFTH CIRCUIT RULE 42.3.1.2 provides "Appeals without Counsel. The clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution, unless the default is remedied before that date. If the default is remedied within that time, the clerk must not dismiss the appeal."

TENTH CIRCUIT RULE 42.1 provides "Dismissal for failure to prosecute. When an appellant fails to comply with the Federal Rules of Appellate Procedure or these rules, the clerk will notify the appellant that the appeal may be

dismissed for failure to prosecute unless the failure to comply is remedied within a designated time."

In summary, in the case of a pro se petitioner, the 11th Circuit has adopted local rules that allow for the court to dismiss a case, without any notification of a deficiency and without the granting of an extension to cure the deficiency. In contrast, in at least two sister U.S. Courts of Appeal, they have adopted local rules that mandate a notification burden on their court followed by an extension period to remedy the deficiency, before a case is dismissed under FRAP 42. Such inconsistent local rules at sister courts is discriminatory and allows for different treatment, solely dependent on a petitioner's geographical location. In other words, had this appeal case been brought before either the Fifth Circuit or Tenth Circuit, rather than the Eleventh Circuit of Appeals of the United States, the filing of the "Record Excerpts" on December 29, 2007, would not have resulted in the dismissal of this case. Therefore, it is argued that this subject dismissal by the 11th Circuit is improper.

U. S. SUPREME COURT RULE 10 CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

As further described in the preceding Argument IV, it is believed that a review is necessary under the U.S. Supreme Court Rule 10, since a United States Court of Appeals has entered a decision in conflict with other United States Court of Appeals on the same matter.

CONCLUSION

Based upon at least four valid arguments, any one of which provides basis, the U.S. Court of Appeals of the Eleventh Circuit abused its discretion in not hearing the case on its merits, but rather ordering upon the pro se litigants the

harsh sanction of dismissal based upon a procedural defect that was diligently cured within days.

For these compelling reasons, the Petitioners Appellants-Plaintiffs urge this Supreme Court of the United States to grant this writ of certiorari and reverse the Eleventh Court of Appeals dismissal to allow for the case to finally be heard on its merits.

BEST AVAILABLE COPY

Respectfully submitted,

Executed on the 1st day of July, 2008.

NOTARY

ANGELA E. VALLADARES
Notary Public - State of Florida
My Commission Expires Oct 17, 2011
Commission # DD 725885
Bonded Through National Notary Assn.

DOREEN PENBERTHY,
Pro se Petitioner

29711 Wells Road
Wesley Chapel, FL 33545
(813) 973-8846

STATE OF FLORIDA
COUNTY OF Hillsborough
On this 01 day of July, 2008.
the foregoing or attached instrument was acknowledged before me by Doreen Torbio Penberthy, who is/are personally known to me or who has/have produced FDL as identification and who (did) (did not) take an oath.

Notary Public

Respectfully submitted,

Executed on the 1st day of July, 2008.

NOTARY

ANGELA E. VALLADARES
Notary Public - State of Florida
My Commission Expires Oct 17, 2011
Commission # DD 725885
Bonded Through National Notary Assn.

RICHARD PENBERTHY,
Pro se Petitioner

29711 Wells Road
Wesley Chapel. FL 33545
(813) 973-8846

STATE OF FLORIDA
COUNTY OF Hillsborough
On this 01 day of July, 2008.
the foregoing or attached instrument was acknowledged
before me by Richard John Penberthy
_____, who is/are personally known to me or who
ive produced FLD
ntification and who (did) (did not) take an oath.

CERTIFICATE OF SERVICE AFFIDAVIT

Pursuant to Rule 29, of the United States Supreme Court, I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail Delivery on this 1st day of July, 2008, to James b. Baldinger, Esquire, Carlton Fields, P.A., 222 Lakeview Avenue, West Palm Beach, FL 33401; Sylvia H. Walbolt, Esquire, Carlton Fields, P.A., 4221 West Boy Scout Boulevard, Suite 1000, Tampa, FL 33607-5780; Christopher J. Kaiser, Esquire, Carlton Fields, P.A., 200 Central Avenue, Suite 2300, St. Petersburg, FL 33701-4352; M. Derek Harris, Esquire, Carlton Fields, P.A., 1201 West Peachtree Street, Suite 3000, Atlanta, GA 30309; and the Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.

NOTARY:

STATE OF FLORIDA
COUNTY OF Hillsborough

On this 01 day of July, 2008, the foregoing or attached instrument was acknowledged before me by Doreen Penberthy, who is/are personally known to me or who has/have produced FLDL as identification and who (did) (did not) take an oath.

Notary Public

By: Doreen Penberthy,
Pro Se Petitioner, for:

Doreen Penberthy,
Richard Penberthy, and
Colette Penberthy,
Pro Se Petitioners

29711 Wells Road
Wesley Chapel, FL 33545
(813) 973-8840

ANGELA E. VALLADARES
Notary Public - State of Florida
My Commission Expires Oct 17, 2011
Commission # DD 725885
Bonded Through National Notary Assn.

APPENDIX

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

June 9, 2008

Ms. Doreen Penberthy
29711 Wells Road
Wesley Chapel, FL 33545

Re: Doreen Penberthy
v. AT&T Wireless Services, Inc.
Application No. 07A968

Dear Ms. Penberthy:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on June 9, 2008 extended the time to and including July 1, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by

Ruth Jones
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

NOTIFICATION LIST

Ms. Doreen Penberthy
29711 Wells Road
Wesley Chapel, FL 33545

Clerk
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-14402-HH

DOREEN PENBERTHY,
RICHARD PENBERTHY,
COLETTE PENBERTHY,

Plaintiffs-Appellants,

versus

AT&T WIRELESS SERVICES, INC.,
a Delaware Corporation,

Defendant-Appellee

Appeal from the United States District Court for the
Middle District of Florida

Before: ANDERSON and HULL, Circuit Judges

BY THE COURT:

The Appellants motion for reconsideration of the Court's January 25, 2008, Order is denied.

[Date stamped as March 13, 2008]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-14402-HH

DOREEN PENBERTHY,
RICHARD PENBERTHY,
COLETTE PENBERTHY,

Plaintiffs-Appellants,

versus

AT&T WIRELESS SERVICES, INC.,
a Delaware Corporation,

Defendant-Appellee

Appeal from the United States District Court for the
Middle District of Florida

Before: ANDERSON and HULL, Circuit Judges

BY THE COURT:

The Appellants' motion to reinstate the appeal is denied.

[Date stamped as January 25, 2008]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-14402-HH

DOREEN PENBERTHY,
RICHARD PENBERTHY,
COLETTE PENBERTHY,

Plaintiffs-Appellants,

versus

AT&T WIRELESS SERVICES, INC.,
a Delaware Corporation,

Defendant-Appellee

On Appeal from the United States District Court for the Middle District of Florida

---

ENTRY OF DISMISSAL

Pursuant to 11th Cir. R. 42-2(c), this appeal is hereby dismissed for want of prosecution because the appellants have failed to file the record excerpts within the time fixed by the rules, effective this 27th day of December, 2007.

THOMAS K. KAHN
Clerk of the United States Court
Of Appeals for the Eleventh Circuit

By: Joe Caruso
Deputy Clerk
FOR THE COURT-BY DIRECTION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DOREEN PENBERTHY, RICHARD PENBERTHY, and COLETTE PENBERTHY,

Plaintiffs,

v. CASE NO: 8:04-cv-2091-R-26TBM

AT&T WIRELESS SERVICES, INC., etc, et al.,

Defendants.
_____/

ORDER

Plaintiffs, proceeding pro se, seek an order from this Court pursuant to Federal Rule of Civil Procedure 60 vacating the Court's order of August 17, 2006, confirming the arbitration award. Having reviewed Plaintiffs' allegations against the record in this case, the Court is of the opinion that Rule 60 affords Plaintiffs no basis for relief. Moreover, with regard to their claim of the existence of newly discovered evidence, Plaintiffs wholly fail to allege the precise nature of that evidence. ACCORDINGLY, Plaintiff's Motion for Relief Under Rule 60 (Dkt. 39) is denied.

DONE AND ORDERED at Tampa, Florida, on August 17, 2007.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO: Counsel of Record